GOVERNMENT OF MALAYSIA & ANOR. v. AKASAH BIN AHAD

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Mohamed Azmi S.C. JJ.) February 8, March 4 & October 21, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 224 of 1984]

Torts – Stoppage of right of access to and from highway – Claim for negligence – Trespass – Nuisance – Liability of Government – Government Proceedings Ordinance, 1956, s.7.

Easement – Stoppage of right of access to and from highway – Claim for negligence – Liability of Government – Government Proceedings Ordinance, 1956, s. 7.

In this case the respondent was a dealer for Shell Malaysia operating a petrol station along the federal highway. The Government decided to widen the highway and build an interchange and this necessitated the closure of the access road to the respondent's petrol station because the ramp to the bridge was higher than the said access road. The Government offered to build a new access road but this was rejected. The respondents brought an action for damages on the ground of negligence. The learned Judge gave judgment for the respondent. The appellants appealed.

Held: (1) under section 7 of the Government Proceedings Ordinance the Government cannot be sued in exercise of its public duty except for breach of contract, negligence or trespass;

(2) the respondent in this case has not proved his case for negligence or nuisance; nor has he made out a case for trespass.

Cases referred to:

(1) *Jones* v. *Llanrwst Urban District Council* [1911] 1 Ch. 393, 402.
(2) *Nicholls* v. *Ely Beet Sugar Factory* [1931] 2 Ch. 84, 87.
(3) *Rylands* v. *Fletcher* (1868) L.R. 3 H.C. 330.
(4) *River Wear Commissioners* v. *William Adamson & Ors.* (1877) 2 App Cas 743, 767.
(5) *Gayler & Pope Ltd.* v. *B. Davies & Son Ltd* [1924] 2 K.B. 75; 40 T.L.R. 591.
(6) *Selangor Pilot Association (1946)* v. *Government of Malaysia* [1975] 2 M.L.J. 66, 67; [1977] 1 M.L.J. 133.

SUPREME COURT.

P. Mahalingam (Senior Federal Counsel) for the appellants.

Franklin Goonting for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This appeal is concerned with the question whether the right of access to and from the highway can be stopped by the Government without regard to the previous position and without payment of compensation. The answer would depend on the particular facts of the case and the relevant laws.

The facts are not in dispute. The plaintiff/respondent was a dealer for Shell Malaysia operating a petrol station under the style of Kedai Minyak AlKasah Alhaz along the federal highway. He commenced business in February, 1966. Originally, the land was leased to three persons, namely, Osman bin Haji Ahmad, Shamsudin bin Isa and Akasah bin Ahad (plaintiff) for a period of 20 years from February 27, 1966 solely for the purpose of erecting a service and petrol filling station. (See lease of State land or Land Reserved For a Public Purpose No. 2174 at page 88 of the Appeal Record). On June 24, 1970 the land was transferred to Shell Malaysia. The Government decided to widen the highway and build an interchange at Kampong Kerinchi. The construction commenced at the end of June, 1976 and was completed in December, 1977. The widening of the highway and building of the interchange necessitated the closure of the access road to the respondent's petrol station because the ramp to the bridge was higher in level than the said access road. For various technical reasons, the defendants/appellants maintained that it was impossible to provide a direct access road to the petrol station because the level of the ramp was higher than the petrol station. One reason was that it would interfere with the motorcycle lane which ran parallel to the highway. Another reason was that such access road would endanger the road users. The defendants offered to build an alternative access road to the petrol station through Kampong Kerinchi. This offer was rejected. As a result the business came to a standstill with the complete cut-off of accessibility to the petrol station.

By a letter dated June 8, 1978 Shell Malaysia wrote to the plaintiff, *inter alia*, that:

"As discussed at the meeting, since the Authorities have not responded to your several appeals regarding the opening of a service road leading to the station and are most unlikely to give their approval, it is agreed that to leave the petrol station in its present state is of no benefit to both parties concerned. Accordingly, it is mutually agreed to terminate the agreement at the end of the month and arrange to remove all our equipment from the site."

The petrol station was built by Shell Malaysia. There was no dispute that Shell Malaysia also built the access road to the highway before the widening. The access road was built on federal road re-

serve. No evidence was adduced to show that Shell Malaysia had obtained permission to build the access road on the federal road reserve.

The plaintiff sued the defendants for damages on ground of negligence. On damages he claimed he earned a nett profit of $2,000/– per month from June 1, 1976. Alternatively, he claimed for loss of $2,000/– per month from June 1, 1976 to the expiry of the lease on June 25, 1986. Under paragraph 8 of the Amended Statement of Claim particulars of negligence are stated to be:

"a) Failure to consider or consider adequately the Plaintiff's said petrol station and its dependance on the existing access road;

b) Failure to avoid blocking the said access road; and

c) Failure to take remedial measures after being notified by the Plaintiff."

Paragraph 8 was added after the defendants referred to section 7(3) of the Government Proceedings Ordinance, 1956 in their defence.

Paragraph 8 of the Amended Defence states:

"8. In expanding the original Kuala Lumpur – Petaling Jaya highway and the construction of the bridge, ramps and motor-cycle lanes at Kampong Kerinchi, the Defendants and their agents were performing a public duty of the Government and therefore no action can be brought against the defendants by virtue of section 7 of the Government Proceedings Ordinance, 1956."

It is convenient at this point to set out the relevant provisions of section 7 of the Government Proceedings Ordinance, 1956 as under:

"7.(1) Notwithstanding any other provisions of this Ordinance to the contrary no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to be done or refused to be done by the Government or any public officer in exercise of the public duties of the Government.

(2) For the purposes of sub-section (1) the expression 'exercise of the public duties' includes:–

a) the construction, maintenance, diversion and abandonment of railways, roads, bridle-paths or bridges;

b) the construction, maintenance and abandonment of schools, hospitals or other public buildings;

c) the construction, maintenance and abandonment of drainage, flood prevention and reclamation works; and

d) the maintenance, diversion and abandonment of the channels of rivers and waterways.

(3) Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties.

(4) Nothing in this Ordinance shall subject the Government, in its capacity as a highway authority to any greater liability than that to which a local authority is subject in that capacity."

Clearly, under section 7 the Government cannot be sued in the exercise of its public duty except for breach of contract, negligence or trespass. The defendant's contention is that in this case the Government is in no way liable. The particulars set out in paragraphs 8(a), (b) and (c) of the Statement of Claim do not amount to negligence.

Having correctly construed that the Government could be liable for negligence and trespass under section 7 the learned Judge went on to show, with great respect incorrectly, that trespass included nuisance. At page 8 of his judgment he states:–

"... The word 'trespass' is a general term for wrongs covered by torts. It includes all legal wrongs, except felony and treason (see *Jowitt's* Dictionary of English law). This means that nuisance is also included in the term 'trespass'. Trespass and nuisance are 2 tortious wrongs. Nevertheless, if scrutinised, trespass and nuisance bear similar terms. According to *Halsbury's* (Vol. 38 para. 1194) 'trespass' connotes a wrongful act of interfering with another person's property or the person of that other without his consent. Nuisance (Vol. 28 para. 152) on the other hand means –

1. acts not permitted by law, or

2. act or omission which obstructs or causes annoyance or damage to the public in the exercise of their common right.

The difference between the two tortious wrongs is only on the consequence because in trespass the act by itself prejudices or damages another person or his property while in nuisance the act by itself does not affect the other person or his property but bears consequences arising out of it (para. 153). Public nuisance is that which causes damage or annoyance to the public, but interference to the enjoyment or use by individual of his property or of his right incidental to his land ownership. It is a trespass against personal right, as distinguished from trespass against the right he enjoys in common with the public."

He then concludes by saying:

"We therefore see that the line of distinction between the meaning of the two wrongs is very fine. Hence from the foregoing we notice that the term 'trespass' in s.7(3) includes all wrongs under the term 'nuisance'."

Not surprisingly, the defendants submitted that if the learned Judge was right the defendants would have no leg to stand. They conceded that at most they could be liable for nuisance if the respondent had obtained permission under the National Land Code to build the access road. However, under section 7 the plaintiff cannot sue the Government for nuisance.

The learned Judge posed the question – "What is the law with regard to the right of access to the adjoining land to the highway to and from the highway?" He went on to discuss the English common law, certain provisions of the National Code, particularly sections 387 and 395, and the Government Proceedings Ordinance. He concluded that:

"..... As there is no statute law on this point, it is clear that the adjoining landowner's right is valid under the common law ...".

The defendants attacked the conclusion of the learned Judge. Reference was made to section 3(1)(a) and section 6 of the Civil Law Act, 1956. "Trespass" was never used but "obstruct" was used to ground action for nuisance.

Nuisance is a wider class than trespass. Whether it is a trespass or a nuisance depends upon whether or not there is a direct physical interference. We do not think this is one of those cases which are described in the books as nuisance of a particular kind analogous to trespass. (See *Jones* v. *Llanrwst Urban District Council*[1] and *Nicholls* v. *Ely Beet Sugar Factory*[2]). As *Clerk & Lindsell* on Torts, 14th Edition, page 819 paragraph 1412, says:

"The distinction between trespass and nuisance is the old distinction between trespass and case. Trespass is a direct entry on the land of another, and is actionable *per se*, without proof of special damage, but nuisance is the infringement of the plaintiff's interest in property without direct entry by the defendant, and generally actionable only on proof of special damage .....".

Street, on The Law of Torts, 2nd Edition, page 214 makes it very clear that:

"Nuisance has to be distinguished from other torts. It overlaps with the rule in *Rylands* v. *Fletcher*[3] which imposes liability for the escape from land of things likely to do mischief if they escape. Yet, as we shall see, there are marked differences: sometimes the courts appear not to have observed these distinctions as sharply as they might with consequent confusion in the law. Nuisance and trespass do not overlap ..."

This case ought to be decided in accordance with the pleadings. Paragraph 8 of the Statement of Claim sets out the particulars of negligence. The plaintiff is entitled to conduct his case and confine his evidence in reliance on paragraph 8. The purpose of such particulars is to define the issues and to let the defendants know the case they have to meet. On the evidence we agree with the submission of the defendants that the plaintiff has failed to establish negligence. That is also the view of the learned Judge. The defendants had not acquired the plaintiff's land. Neither had they entered the plaintiff's land. It is not in dispute that the land in question is federal reserve land. We cannot see how the plaintiff could in the circumstances succeed in trespass on the facts of this case. Where an occupier of premises adjoining the highway who has suffered damage as a result of works carried out lawfully in the extension of the highway the person who suffered the damage cannot recover in trespass in the absence of negligence on the part of the person who caused the damage. That principle of the common law has been laid down as early as 1877 in *The River Wear Commissioners* v. *William Adamson & Ors.*[4] by Lord Blackburn in these words:

"My Lords, the Common Law is, I think, as follows:– Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railways or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good ...".

This principle was applied by McCardie J. in *Gayler And Pope Ltd.* v. *B. Davies And Son Ltd.*[5] when he rejected the contention that the plaintiff could succeed in trespass in the absence of negligence or wilful intention. We see no reason why such a principle cannot be adopted in this case.

It is the contention of the defendants that they are not liable for nuisance under section 7 of the Government Proceedings Ordinance, 1956. We are not concerned with public nuisance which is covered by section 8. Clearly, section 7 permits a person to sue the Government for negligence or trespass. However, the liability of the Government in tort is set out in section 5 which reads:

"5. Subject to the provisions of this Ordinance, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government."

This section is wide enough to cover private nuisance. It makes the Government liable in tort in respect of any breach of duties attaching

at common law to the ownership, occupation or control of property as though it were a private person. The effect of this section is to render the Government liable in nuisance in respect of property it occupies or owns. This refers only to duties existing at common law. From liabilities imposed upon owners or occupiers by the statute the Government remains immune unless the statute imposing the liabilities itself applies to the Government.

The plaintiff construed section 7(4) of the Government Proceedings Ordinance, 1956 to mean Government liability is the same as any local authority. He attempted by tracing the duties of the local authorities when they acted as highway authority. He referred to sections 197, 369, 371 and 379 of the Municipal Ordinance of the Straits Settlement (Cap. 133). This Ordinance is no longer in force. The matters are now governed by two Acts, namely, Local Government Act, 1976 (Act 71) and Streets, Drainage and Building Act, 1974 (Act 133). Both came into force on January 1, 1977. His contention is that if, under section 7 of the Government Proceedings Ordinance, 1956 the Government can deprive a person of compensation it would be *ultra vires* Article 13 of the Federal Constitution. In support he cited *Selangor Pilot Association (1946)* v. *Government of Malaysia & Anor.*[6] It is therefore his submission that section 7 does not have the effect of depriving a person of property without compensation.

Section 7(4) restricts the liability of the Government. The Government is not liable to any greater liability than that of a local authority. This is a necessary saving in view of the fact that section 5 in general terms puts the Government into the same position as a private person. Thus the Government is not to be subject to any greater liability in its capacity as a highway authority than it would be if it were a local authority in the latter's capacity as highway authority.

It is not in dispute that the plaintiff earned $2,000/- nett profit per month at the time of the construction of the interchange. He expected to operate the petrol station until the lease expired in 1986. Because of the closure of the access road Shell Malaysia terminated the agreement. The plaintiff would not accept the alternative access road as it was not suitable to his business. As the plaintiff was merely a dealer Shell Malaysia had the final say.

We agree with the submission of the defendants that section 7(4) merely restricts the liability of the Government in its capacity as highway authority. One can only get the same amount of damages or compensation as one can get from a local authority in its capacity as highway authority. Section 7(4) does not create liability. "Local authority" is defined in section 2 of the Local Authority Act, 1976. It does not include Government of Malaysia. Local Authorities and Government of Malaysia are distinct bodies.

The defendants did not acquire any land. Neither did they go into anybody's land in carrying out the extension of the highway. Reference was made to the National Land Code (Amendment) Act, 1984. This Act will only come into force on a date to be appointed by the Minister concerned. So the Act has not come into operation yet. The plaintiff has never pleaded the agreement with Shell Malaysia. Neither has the plaintiff pleaded section 70 of the Road Traffic Ordinance in support of his claim. He stopped his business because Shell Malaysia terminated his agreement. He should sue Shell Malaysia, if he has any ground, for breach of contract.

As to damages the defendants accepted $2,000/- per month as the nett profit but questioned the mode of assessment. The land was transferred to Shell Malaysia in 1970. There was no evidence to show that Shell Malaysia allowed the plaintiff to carry on up to 1986 when the lease would expire. The defendants offered to build an access road but this was rejected. Further, the plaintiff failed to adduce evidence to show any agreement with Shell Malaysia up to 1986 to support his claim. The agreement was never pleaded. The petrol station was closed at the end of June, 1978. The plaintiff could not just do nothing and claim $2,000/- per month. He could find alternative site or get another job. It is the submission of the defendants that there was no evidence to support the award made by the learned Judge. It is for the plaintiff to prove his case. He has in our view failed to do so.

For reasons given we would allow the appeal with costs.

Appeal allowed.

Solicitors: *Wahab Rashid & Co.*